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LIMITED RELIEF FOR FEDERAL EMPLOYEES HYPERSENSITIVE TO TOBACCO SMOKE: FEDERAL EMPLOYERS WHO'D RATHER FIGHT MAY HAVE TO SWITCH

For over ten years, the Surgeon General has officially recognized the potential hazards which secondhand tobacco smoke¹ presents to the health of nonsmokers.² An increasing body of medical research supports the proposition that tobacco smoke presents a health risk not only to those who smoke voluntarily³ but also to those involuntarily exposed to tobacco smoke.⁴

1. Secondhand smoke has two sources: mainstream smoke, which is exhaled by the smoker, and sidestream smoke, which is released directly from the burning end of the cigarette and from the mouthpiece when the smoker is not inhaling. Sidestream smoke contains a much greater concentration of toxic components because smokers "filter" mainstream smoke by inhaling it. STANFORD ENVTL. LAW SOC'Y, *THE LEGAL ASPECTS OF SMOKING REGULATION* 8-9 (1978).

2. The 1972 Surgeon General's Report on the hazards of smoking included for the first time sections on the adverse effects of nonsmokers' exposure to secondary smoke. PUBLIC HEALTH SERV., U.S. DEP'T OF HEALTH, EDUC. & WELFARE, *THE HEALTH CONSEQUENCES OF SMOKING* 101-35 (1972). Subsequent reports have periodically included similar sections. *E.g.*, PUBLIC HEALTH SERV., U.S. DEP'T OF HEALTH, EDUC. & WELFARE, *THE HEALTH CONSEQUENCES OF SMOKING* 1975, at 83-112 (summarizing studies of nonsmoker absorption of toxic components in tobacco smoke and pathological effects of nonsmoker exposure) [hereinafter cited as 1975 HEALTH CONSEQUENCES]; PUBLIC HEALTH SERV., U.S. DEP'T OF HEALTH & HUMAN SERVS., *THE HEALTH CONSEQUENCES OF SMOKING—CANCER* 237-54 (1982) (summarizing evidence of relationship between involuntary smoking and lung cancer) [hereinafter cited as 1982 HEALTH CONSEQUENCES].

3. See generally PUBLIC HEALTH SERV., U.S. DEP'T OF HEALTH & HUMAN SERVS., *THE HEALTH CONSEQUENCES OF SMOKING—CARDIOVASCULAR DISEASE* 1-242 (1983) (summarizing medical evidence that voluntary smoking is a major cause of cardiovascular disease); 1982 HEALTH CONSEQUENCES, *supra* note 2, at 1-235 (summarizing medical evidence of relationships between voluntary smoking and various forms of cancer; concludes that smoking is the major cause of lung cancer in this country).

4. See, *e.g.*, Hirayama, *Non-smoking wives of heavy smokers have a higher risk of lung cancer: a study from Japan*, 282 BRIT. MED. J. 183, 183-85 (1981) (nonsmoking wives of smoking husbands have a higher risk of developing lung cancer than wives of nonsmokers); Miller, *Lung Cancer: A Comparison of Incidence Between the Amish and Non-Amish in Lancaster County*, 1983 J. IND. ST. MED. A. 121, 123 (1983) (lower incidence of lung cancer in Amish than in non-Amish population due to absence of secondhand smoke); White & Froeb, *Small-Airways Dysfunction in Nonsmokers Chronically Exposed to Tobacco Smoke*, 302 NEW ENG. J. MED. 720, 720-23 (1980) (passive smokers have same risk of long-term small-airways dysfunction as light and non-inhaling smokers). See generally Comment, *Where There's Smoke There's Ire: The Search for Legal Paths to Tobacco-Free Air*, 3 COLUM. J. FOR ENVTL. L. 62, 62-68 (1976) (collecting and analyzing available medical evidence of hazards of involuntary smoking); Comment, *The Non-Smoker in Public: A Review and Analysis of Non-Smokers' Rights*, 7 SAN FERN. V.L. REV. 141, 143-47 (1979) (same).

The term "involuntary smoking" refers to the inhaling of tobacco smoke by individuals who are not themselves smoking but who are breathing in an atmosphere with tobacco smoke. This phenomenon is also described as "passive smoking." 1975 HEALTH CONSEQUENCES, *supra* note 2, at 87.

Despite legislative⁵ and judicial⁶ efforts to control tobacco smoking in public places, smoking in the workplace continues to cause problems. This Comment analyzes two recent decisions that addressed claims for relief by federal government employees who suffer severe reactions to tobacco smoke: *Parodi v. Merit Systems Protection Board*,⁷ and *Vickers v. Veterans Administration*.⁸ The claims were brought under statutory schemes designed to meet the employment needs of the physically or mentally disadvantaged. The relief granted or considered in each decision gave the hypersensitive nonsmoker only a partial victory. In addition, the *Vickers* and *Parodi* decisions offer no assistance to nonsmokers who are not hypersensitive but who are concerned enough about the health hazards of involuntary exposure to want smoking prohibited in the workplace. Nonetheless, they offer hope to those most immediately injured by involuntary exposure to tobacco smoke: hypersensitive nonsmokers.

I. LEGAL BACKGROUND

The effort to prohibit tobacco smoking in the workplace has previously arisen under a variety of legal theories, ranging from constitutional claims⁹ to common-law nuisance¹⁰ and assault and battery.¹¹ Regardless of the theory for relief, however, the inability of plaintiffs to demonstrate

5. E.g., COLO. REV. STAT. §§ 25.14.102-.105 (1973) (smoking prohibited in most public places with exception of enclosed offices occupied exclusively by smokers); MINN. STAT. ANN. §§ 144.411-.417 (West Supp. 1983) (same); MONT. CODE ANN. §§ 50.40.101-.109 (1983) (covers most places of work but requires only segregation of smokers and nonsmokers); NEB. REV. STAT. §§ 71-5701 to -5708 (1981) (smoking prohibited in most public places with exception of enclosed offices occupied exclusively by smokers); UTAH CODE ANN. §§ 76.10.101-.106 (1978) (power to restrict or prohibit smoking in private places of employment delegated to local boards of health).

6. E.g., *Shimp v. New Jersey Bell Tel. Co.*, 145 N.J. Super. 516, 368 A.2d 408 (Ch. Div. 1976) (banning tobacco smoke in workplace of hypersensitive nonsmoker); *Smith v. Western Elec. Co.*, 643 S.W.2d 10 (Mo. Ct. App. 1982) (same). See *infra* notes 18-20 and accompanying text.

7. 690 F.2d 731 (9th Cir. 1982).

8. 549 F. Supp. 85 (W.D. Wash. 1982).

9. See, e.g., *Gasper v. Louisiana Stadium & Exposition Dist.*, 418 F. Supp. 716 (E.D. La. 1976) (claims brought under fifth and fourteenth amendments' due process clauses, on theory that tobacco smoke pollution threatens right to live in non-hazardous environment; under ninth amendment, on theory that right to smoke-free air is a "fundamental right"; and under first amendment, on theory that permitting smoking in public places forces nonsmokers to stay away, thereby infringing their right to get information), *aff'd*, 577 F.2d 897 (5th Cir. 1978), *cert. denied*, 439 U.S. 1073 (1979); *Federal Employees for Non-Smokers' Rights (FENSR) v. United States*, 446 F. Supp. 181 (D.D.C. 1978) (claims under first and fifth amendments), *aff'd mem.*, 598 F.2d 310 (D.C. Cir.), *cert. denied*, 444 U.S. 926 (1979).

10. *Ravreby v. United Airlines*, 293 N.W.2d 260, 262 (Iowa 1980) (theory abandoned on appeal). Numerous commentators have suggested this approach. E.g., Comment, *The Legal Conflict Between Smokers and Nonsmokers: The Majestic Vice Versus The Right to Clean Air*, 45 Mo. L. REV. 444, 467-70 (1980), and authorities cited therein.

11. *McCracken v. Sloan*, 40 N.C. App. 214, 252 S.E.2d 250 (1979).

immediate harm from their exposure to secondhand tobacco smoke is a major obstacle to all such efforts.¹² Although some long-term health hazards of involuntary smoking have already been identified,¹³ studies have as yet shown only minor immediate health consequences for the average healthy nonsmoker involuntarily exposed to tobacco smoke.¹⁴

The adverse health consequences of involuntary exposure to tobacco smoke vary, however, with the susceptibility of the person exposed.¹⁵ For individuals who are allergic or "hypersensitive" to tobacco smoke, exposure can result in a variety of symptoms, including substantial difficulty in breathing.¹⁶ Only hypersensitive nonsmokers have successfully obtained judicial relief for smoking in the workplace.¹⁷ In 1976, in *Shimp v. New Jersey Bell Telephone Co.*,¹⁸ the Superior Court of New Jersey became the first court to recognize and protect the rights of hypersensitive employees to a workplace free of tobacco smoke. The *Shimp* court granted injunctive relief¹⁹ banning tobacco smoking in Shimp's workplace, basing its decision on the common-law duty which every employer owes its employees to provide a safe working environment.²⁰

12. See, e.g., *Rotenberg v. Industrial Comm'n*, 42 Colo. App. 161, 590 P.2d 521 (1979); *Ruckstuhl v. Commonwealth, Unemployment Compensation Bd. of Review*, 57 Pa. Commw. 302, 426 A.2d 719, 721 (1981); see also *McCracken*, 252 S.E.2d at 252 (although plaintiff using battery theory need only establish harmful or offensive contact rather than actual harm, "[s]melling smoke from a cigar . . . would ordinarily be considered . . . an innocuous and generally permitted contact").

13. See *supra* notes 2 & 4.

14. 1975 HEALTH CONSEQUENCES, *supra* note 2, at 107 ("the effects of cigarette smoke on healthy nonsmokers consists [sic] mainly of minor eye and throat irritation").

15. *Id.* at 99.

16. A. BRODY & B. BRODY, *THE LEGAL RIGHTS OF NONSMOKERS* 33 (1977). Exposure to tobacco smoke can also significantly exacerbate the medical condition of individuals who have chronic cardiovascular or lung disease. 1975 HEALTH CONSEQUENCES, *supra* note 2, at 105-07.

17. E.g., *Alexander v. California Unemployment Ins. Appeals Bd.*, 104 Cal. App. 3d 97, 163 Cal. Rptr. 411 (1980) (allergic plaintiff entitled to unemployment benefits because she had good cause to refuse employment where tobacco smoking permitted); see also *Schober v. Mountain Bell Tel.*, 96 N.M. 376, 630 P.2d 1231 (1980) (hypersensitive claimant awarded partial disability benefits under state workers' compensation statute).

18. 145 N.J. Super. 516, 368 A.2d 408 (Ch. Div. 1976).

19. See *Shimp*, 368 A.2d at 416. The *Shimp* decision was unprecedented in its use of an injunction to relieve unsafe working conditions. Although prior decisions awarding damages for injuries sustained by employees had recognized that employers have a duty to provide a reasonably safe workplace, no prior court had "directly ruled on the question of an employee's right to compel his employer to provide safe working conditions." Note, *Torts—Occupational Safety and Health—Employee's Common Law Right to a Safe Workplace Compels Employer to Eliminate Unsafe Conditions*, 30 VAND. L. REV. 1074, 1077 n.14 (1977). For extensive analyses of the *Shimp* decision, see *id.* at 1074-83; Note, *Employment—Employee's Right to a Safe, Healthy Work Environment—Injunction Issued Prohibiting Tobacco Smoking in Offices and Customer Service Area on Employer's Premises*, 8 CUM. L. REV. 579 (1977).

20. 368 A.2d. at 410-11.

In 1982, the Missouri Court of Appeals employed a similar rationale in *Smith v. Western Elec.*, 643 S.W.2d 10 (Mo. Ct. App. 1982), and became the second state court to approve of injunctive

The *Parodi* and *Vickers* opinions discussed the rights of hypersensitive employees to a smoke-free workplace under theories strikingly different from the *Shimp* decision. Each claim was based on a federal statute,²¹ and both plaintiffs successfully established an extreme sensitivity to tobacco smoke that qualified them for special consideration in employment.²²

II. THE *PARODI* DECISION

A. *Opinion of the Court*

Irene Parodi, a federal employee, was transferred to an office where many other employees smoked cigarettes.²³ She began to miss work due to pulmonary difficulties diagnosed as "asthmatic bronchitis with hyper-irritable airways disease."²⁴ Her doctor recommended that she not return to work in that environment.

Parodi filed a petition for federal disability retirement benefits with the Office of Personnel Management (OPM).²⁵ The OPM found that she was not "totally disabled" within the meaning of the disability retirement statute and denied her petition for benefits.²⁶ The Merit Systems Protection Board (MSPB)²⁷ affirmed the OPM's decision.²⁸

Parodi appealed to the Ninth Circuit Court of Appeals, claiming that the OPM and MSPB had misconstrued the statutory definition of "disability."²⁹ The version of the statute governing Parodi's claim defined di-

relief to eliminate tobacco smoke in the workplace to protect the rights of a hypersensitive employee. *Id.* at 12-13.

21. Parodi claimed that she was entitled to disability retirement benefits under the version of 5 U.S.C. § 8337(a) then in effect: Act of Sept. 6, 1966, Pub. L. No. 89-554, § 8331(6), 80 Stat. 378, 572 (current version at 5 U.S.C. § 8337(a) (1982)). See *Parodi*, 690 F.2d at 737. *Vickers* brought suit under § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (Supp. V 1981), which prevents executive agencies from discriminating against otherwise qualified individuals solely by reason of their handicaps. See *Vickers*, 549 F. Supp. at 87.

22. *Parodi*, 690 F.2d at 738; *Vickers*, 549 F. Supp. at 86-87.

23. 690 F.2d at 732.

24. *Id.* at 737 n.9. Although Parodi sustained no permanent physical injury, one doctor who examined her conducted a test exposing her to cigarette smoke which produced acute adverse reactions within four minutes. *Id.* at 733.

25. *Id.* The Office of Personnel Management (OPM) is responsible for the administration of 5 U.S.C. §§ 8331-8348 (1982), pursuant to *id.* § 8347(a), including determining questions of disability for the purposes of § 8337. 5 U.S.C. § 8347(c) (1982).

26. 690 F.2d at 733.

27. The OPM's decision was reviewed by the MSPB pursuant to 5 U.S.C. § 8347(d) (1982).

28. The MSPB did note that Parodi "might reasonably be concerned with the probable risk to her future health from working in an environment where exposure to cigarette smoke presents a hazard to all employees, and particularly to herself because of her peculiar physical sensitivity." " 690 F.2d at 733 (quoting MSPB opinion).

29. Although 5 U.S.C. § 7703 (1982) provides for review of MSPB decisions by the United States Court of Claims or Court of Appeals, § 8347(c) insulates decisions of the OPM determining

sability as the inability to provide useful and efficient service due to disease or injury.³⁰ After noting that Parodi's condition was diagnosed as a disease, the Ninth Circuit found that she was disabled because she was unable to perform useful and efficient service in the smoke-filled conditions which existed in her workplace.³¹ The court reasoned that the conditions in Parodi's workplace imposed an "environmental limitation" which rendered her as disabled for her job assignment in a smoke-filled office as any physical or mental limitation.³²

questions of disability arising under the disability retirement statute: "the decisions of the Office concerning these matters are final and conclusive and are not subject to review." 5 U.S.C. § 8347(c) (1982). OPM and MSPB contended that Parodi's claim was not subject to any judicial review. 690 F.2d at 734. However, the *Parodi* court adopted a limited form of judicial review as first outlined in *Scroggins v. United States*, 397 F.2d 295 (Ct. Cl.), *cert. denied*, 393 U.S. 952 (1968), permitting judicial review where the agency has substantially infringed procedural rights, misconstrued a controlling statute, or committed "some like error going to the heart of the administrative determination." 690 F.2d at 737.

The Eighth Circuit has rejected the *Scroggins* rule, holding that 5 U.S.C. § 8347(c) (1982) precludes any judicial review of voluntary disability decisions. *Morgan v. Office of Personnel Management, Merit Sys. Protection Bd.*, 675 F.2d 196 (8th Cir. 1982).

30. Prior to its amendment in 1980, the statute defined disability as "total disability . . . for useful and efficient service in the grade or class or position last occupied by the employee or Member because of disease or injury not due to vicious habits, intemperance, or willful misconduct on his part within 5 years before becoming so disabled." Act of Sept. 6, 1966, Pub. L. No. 89-554, § 8331(6), 80 Stat. 378, 566 (formerly codified at 5 U.S.C. § 8331(6); repealed 1980).

In 1980, Congress repealed § 8331(6) and added a new definition of disability. Omnibus Reconciliation Act of 1980, Pub. L. No. 96-499, § 403(a), (b), 94 Stat. 2599, 2605-06 (§ 403(a) is codified at 5 U.S.C. § 8337(a) (1982); § 403(b) repealed former § 8331(6)). The new definition provides:

Any employee shall be considered to be disabled only if the employee if [sic] found by the Office of Personnel Management to be unable, because of disease or injury, to render useful and efficient service in the employee's position and is not qualified for reassignment, under procedures prescribed by the Office, to a vacant position . . . at the same grade or level and in which the employee would be able to render useful and efficient service.

5 U.S.C. § 8337(a) (1982).

According to the legislative history, this change was designed to modify only the requirement imposed by some courts, notably *Cerrano v. Fleischman*, 339 F.2d 929 (2d Cir. 1964), *cert. denied*, 382 U.S. 855 (1965), that suitable employment of the same grade or position be limited to the specific position occupied by the employee prior to a determination of disability. H.R. REP. NO. 1167, 96th Cong., 2d Sess. 206, *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS 5526, 5651. The new definition was intended to retain the "present requirement that the employee be unable, because of disease or injury, to render useful and efficient service in his or her position." *Id.*

31. 690 F.2d at 738. The court reasoned that the statute did not require that the claimant have a serious or permanent physical problem. *Id.* The court contrasted the statute's definition of disability with that provided in the federal disability insurance benefits statute, which defines disability as the "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months." 42 U.S.C. § 423(d)(1)(A) (1976).

32. The court dismissed the contention that Parodi was not entitled to disability benefits because she was physically able to perform the tasks of her job in a smoke-free environment as "irrelevant." 690 F.2d at 738. The court noted that environmental limitations (or "non-exertional limitations") were recognized in analogous areas of the law. *Id.* at 739 n.13. For example, the Social Security

The court explained, however, that Parodi would not be disabled under the statute if the government offered her employment at the same grade level with working conditions suitable for her environmental limitation.³³ Therefore, the court gave the government-employer two alternatives. First, it could relocate Parodi in a comparable smoke-free position. Second, it could remove the environmental limitation at her present workplace by imposing a partial or total ban on tobacco smoke in the workplace.³⁴ The court held that if it did neither, Parodi was entitled to disability benefits.³⁵

B. *Analysis of the Court's Opinion*

The *Parodi* court correctly rejected the OPM's distinction between physical or mental limitations and environmental limitations. Because the statutory definition of disability is functional rather than developmental,³⁶ the test is whether the employee is unable, because of disease or injury, to provide useful and efficient service in her assigned position. This approach necessarily includes environmental limitations imposed by the nature or location of a claimant's work. Whether Parodi could perform the physical tasks of her position outside of her assigned workplace is irrelevant.³⁷

Administration defines "environmental restrictions" as "restrictions which result in inability to tolerate some physical feature(s) of work settings that occur in certain industries or types of work, e.g., an inability to tolerate dust or fumes." 20 C.F.R. pt. 404, subpt. P, app. 2, § 200.00(e) (1983).

33. 690 F.2d at 739. The court placed the burden of proving that a suitable job was available on the agency, reasoning that the agency was in a better position than Parodi to demonstrate the availability of a suitable job. *Id.* The court relied on *Cerrano v. Fleishman*, 339 F.2d 929 (2d Cir. 1964), *cert. denied*, 382 U.S. 855 (1965), which held that an employee seeking disability retirement benefits did not have to prove that "he was unable to perform any of the jobs which for administrative convenience are put in the same grade or class and in which, at the time, there might be an opening." *Id.* at 931. Although the *Cerrano* court's requirement that the government show alternative employment in the particular position of the claimant was specifically changed under the new statutory definition of disability, *see supra* note 30, it remains true under the new statute that the government is in a better position than the claimant to know of the availability of an appropriate job without the environmental limitations present at the existing job.

34. *See infra* note 40 and accompanying text (*Parodi* court's confusion of reduction with elimination of tobacco smoke).

35. 690 F.2d at 739. The *Parodi* court gave the government 60 days in which to make its decision. *Id.* at 740. Because it was unclear from the record whether the government had offered Parodi suitable alternative employment, the court remanded the case to the district court. It also suggested that the district court could extend the 60-day limitation if good cause was shown. *Id.*

36. A developmental disability is a severe and chronic disability which impedes development of a person's ability to function normally in society. *See* 42 U.S.C. § 6001(7) (Supp. V 1981).

37. The question whether a person is "disabled" necessarily turns upon why the question is asked. For example, a paraplegic may have no difficulty in providing useful and efficient service in most positions but may be "disabled" under 5 U.S.C. § 8337(a) (1982) if his job conditions require the mobility of an able-bodied person. *See generally* DEVELOPMENTAL DISABILITIES STATE LEGISLA-

Unlike physical or mental limitations, however, removal of an environmental limitation effectively eliminates the disability as well. Because Parodi could perform usefully and efficiently in a smoke-free environment, she would not be disabled in a smoke-free workplace. In addition, environmental limitations can be inherent or incidental to the work to be performed.³⁸ Parodi's environmental limitation was incidental to her position as an office worker because offices can and do function in a smoke-free atmosphere.³⁹

Yet under the disability retirement statute, the court could only order that Parodi was entitled to disability benefits. The court's discussion of employer alternatives went only to the threshold issue of whether Parodi was "disabled" within the meaning of the statute. The statute simply provides retirement benefits for disabled federal employees with five or more years service. Under the statute, courts can only determine whether an employee is disabled: they cannot require the government to remove the environmental limitation imposed on a hypersensitive employee by her smoking coworkers.

Even within the statutory limitations, however, the *Parodi* court was unnecessarily ambiguous in outlining the government's options. It left unclear whether the government can correct the environmental restriction by reducing rather than eliminating Parodi's exposure to tobacco smoke at the workplace. The court expressly suggested that a position in a workplace with less smoke could be suitable employment for Parodi.⁴⁰ By giv-

TIVE PROJECT, COMM'N ON THE MENTALLY DISABLED, ELIMINATING ENVIRONMENTAL BARRIERS 1 n.2 (1979) (discussing wide divergence in estimates on numbers of disabled persons in the United States due to varying effects of defined handicaps in different life activities).

38. A person who is afraid of heights is environmentally limited in a career as a window-washer of high-rise buildings because the environmental limitation is inherent in that type of workplace: it cannot be eliminated. In contrast, the environmental limitation which an office with entrances inaccessible to wheelchairs presents to paraplegics is an incidental limitation: it will not impair the functioning of an office to make its entrances accessible. *See infra* note 62 (differentiating between surmountable and insurmountable impairment barriers).

39. *See generally* ENVIRONMENTAL IMPROVEMENT ASSOCS., PUB. NO. MB-200, IMPROVING THE WORK ENVIRONMENT—A MANAGEMENT GUIDE TO SMOKE FREE WORK AREAS (1983) (listing management advantages to banning smoking in the workplace and reporting legal challenges to employers who permit smoking); Amicone, *Clearing the Smoke from the Workplace*, AM. LUNG A. BULL., Dec. 1981, at 4 (reviewing costs of employee smoking and employer experiences in restricting or banning smoking); *The Weekly* (Seattle), May 4–10, 1983, at 9, col. 1 (presenting estimates of annual cost of one employee's smoking habit to an employer ranging from \$624 to \$4789 per year and reviewing Northwest employers' experiences in restricting or banning smoking). *But see* Montagno, *Minnesota: No Smoking*, NEWSWEEK, Dec. 8, 1975, at 35 (reporting business concerns about no-smoking policies because of costs of increased breaks for smokers and preferential treatment in number of breaks over nonsmokers); *The Weekly* (Seattle), May 4–10, 1983, at 9, col. 1 (although cost-savings can be achieved through active management efforts, implementation of no-smoking policies can cause complaints about smokers taking extra breaks from work to smoke).

40. 690 F.2d at 740 n.15. However, the court's suggestion that both parties agreed that Parodi could work in an environment containing less smoke, *id.* at 737, is inconsistent with its observation

ing the government the option to offer a position in a workplace with "less smoke" as suitable employment, however, the court left open another question: how much must the employer reduce Parodi's exposure to tobacco smoke to remove the environmental limitation? The statutory standard—until she is able to perform useful and efficient service—does not provide the government with concrete guidelines as to how much tobacco smoke is permissible. If, moreover, Parodi is unable to work in conditions involving any exposure to tobacco smoke, there is no "less smoke" alternative for the government employer.

Because involuntary smoking presents a long-term health risk to all individuals⁴¹ and no-smoking policies improve overall job efficiency,⁴² it is senseless to allow the government to remove the hypersensitive employee by paying disability benefits rather than removing the unnecessary environmental hazard. For if the government chooses to pay disability benefits, a "willing and able" employee⁴³ will not work. As a result, the government will have to pay disability benefits for an environmental limitation which it has the power and ability to remove.

III. THE *VICKERS* DECISION

A. *Opinion of the Court*

Lanny Vickers, an employee of the Veterans Administration (VA), filed suit against that agency⁴⁴ seeking money damages or equitable relief under section 504 of the Rehabilitation Act of 1973⁴⁵ for its refusal to eliminate tobacco smoke in his workplace. Section 504 prohibits discrimination by federal employers and grantees against otherwise qualified

that Parodi contended that she was unable to work if she was exposed to any tobacco smoke, *id.* at 737-38 n.10. Although Parodi had testified that she would work only if her environment was "completely free" of cigarette smoke, Petitioner's Reply Brief, Petition for Review at 22, *Parodi*, she would not be entitled to disability benefits if the government offered her employment in an environment with some exposure to tobacco smoke but in which she could perform useful and efficient service.

Because the government had not offered Parodi such employment, the court reasoned that the issue of whether Parodi required absolute isolation from tobacco smoke or just less exposure than at her existing workplace was irrelevant to its disposition. 690 F.2d at 738 n.10.

41. See *supra* notes 2-4.

42. See *supra* note 39.

43. 690 F.2d at 739.

44. *Vickers v. Veterans Admin.*, 549 F. Supp 85, 85 (W.D. Wash. 1982). Vickers also sought recovery against his superior, a smoker. Under the standard announced in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), he was entitled to recover only if his superior, a government official, had violated "clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* at 818. The *Vickers* court found that Vickers had not proved any such violation. 549 F. Supp. at 86.

45. 29 U.S.C. § 794 (Supp. V 1981).

handicapped persons based on their handicap.⁴⁶ Vickers' doctor had previously diagnosed him as having respiratory diseases which made him unusually sensitive to tobacco smoke.⁴⁷ The District Court for the Western District of Washington found that (1) he was handicapped under 29 U.S.C. § 706(7)(B),⁴⁸ because his "unusual sensitivity" limited a "major life activit[y]"⁴⁹ by making him unable to work while exposed to even a minimal amount of tobacco smoke, but that (2) the Veterans Administration had made reasonable efforts to accommodate his handicap.⁵⁰

No evidence showed that the VA had discriminated against Vickers because of his hypersensitivity to tobacco smoke.⁵¹ Vickers urged, however, that the VA owed him more than the passive duty not to discriminate against him based on his handicap. He contended that the VA had an affirmative duty "to make reasonable accommodations to his physical handicap by providing a work environment that is free of tobacco smoke."⁵² Expressly reserving its ruling on the question, the court based its decision on the assumption that the VA was under such a duty.⁵³

The court therefore reviewed in detail the VA's efforts to accommodate Vickers' hypersensitivity to tobacco smoke.⁵⁴ The court noted that, as a

46. Section 504 provides in pertinent part:

No otherwise qualified handicapped individual in the United States, as defined in section 706(7) of this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.

Rehabilitation Act of 1973 § 504, 29 U.S.C. § 794 (Supp. V 1981).

While it is not clear that § 504 imposes a duty on federal employers to make affirmative accommodations to handicapped employees, as opposed to merely refraining from discriminating against them, *see infra* note 62, federal employers are required to make accommodations under § 501 of the Act, 29 U.S.C. § 791 (1976). *See infra* note 60. The private cause of action against such employers for violations of § 501 provided in § 505(a)(1) of the Act, 29 U.S.C. § 794a(a)(1) (Supp. V 1981), is subject, however, to a requirement that a plaintiff exhaust his administrative remedies. *See* 42 U.S.C. § 2000e-16(c) (1976) (42 U.S.C. § 2000e-16(c) is incorporated by reference in § 505(a)(1) to govern remedies for violations of § 501). *See infra* note 59.

47. His doctor stated that "[i]t is highly likely that having to work in an enclosed space with an atmosphere containing cigarette smoke is directly causing and prolonging his condition." Plaintiff's Trial Brief at 2, *Vickers v. Veterans Admin.*, 549 F. Supp. 85 (W.D. Wash. 1982).

48. Under the statute, "the term 'handicapped individual' means . . . any person who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment." 29 U.S.C. § 706(7)(B) (Supp. V 1981).

49. 549 F. Supp. at 86-87.

50. *Id.* at 89.

51. *Id.* at 87. The court noted that Vickers had received high job performance ratings and at least three incentive awards. *Id.*

52. *Id.*

53. *See infra* note 59.

54. 549 F. Supp. at 87-89. While the VA had not banned smoking in the workplace, it had obtained voluntary agreements among Vickers' immediate coworkers not to smoke in the office. It

result of the VA's accommodations, Vickers was exposed only to smoke which might "at times drift into" his workplace from adjoining offices.⁵⁵ Furthermore, the court emphasized the VA's national policy to maintain "an equitable balance between the rights of smokers and nonsmokers,"⁵⁶ and found that Vickers himself had failed to take action to limit his exposure to smoke in the workplace.⁵⁷ The court therefore held that the VA had satisfied its hypothetical obligation to Vickers.

B. Analysis of Court's Opinion

The *Vickers* court was correct in its determination that hypersensitivity to tobacco smoke can qualify an individual as "handicapped" under the Rehabilitation Act.⁵⁸ The statutory definition focuses only on the impairment of a person's ability to live his or her life; disease or injury is not required. The court found that Vickers' sensitivity to tobacco smoke limited his ability to function in a workplace with tobacco smoke and correctly regarded working as a major life activity. Nothing more is required to qualify Vickers as handicapped under the Act.

Had it chosen to rule on the affirmative duty question, the *Vickers* court should have held that the VA had a duty to make reasonable accommodations for Vickers' handicap.⁵⁹ As a federal employee, Vickers is entitled

had installed or offered to install physical barriers and equipment to reduce his exposure to tobacco smoke. The VA also offered Vickers an outside maintenance position. *Id.* at 88.

The accommodations cited by the court rely in large part on segregating smokers and nonsmokers to reduce the latter's exposure to tobacco smoke. The effectiveness of such segregation is open to question. See generally Olshansky, *Is Smoker/Nonsmoker Segregation Effective in Reducing Passive Inhalation among Nonsmokers?*, 72 AM. J. PUB. HEALTH 737 (1982) (smokers and nonsmokers segregated in a single environmental setting were exposed to similar levels of ambient carbon monoxide).

55. 549 F. Supp. at 89.

56. *Id.* The Director of the VA Medical Center in which Vickers worked had promulgated a local policy permitting smoking in office areas. The *Vickers* court stated that in the absence of a legislative or agency ban on smoking in the workplace, "the desires of those employees who wish to smoke cannot be disregarded." *Id.*

57. The court noted that he failed to move his desk away from a connecting door and that he could close that door at any time. Either action would have limited his exposure to tobacco smoke. *Id.* at 89-90.

58. But see *GASP v. Mecklenburg County*, 42 N.C. App. 225, 256 S.E.2d 477, 479 (1979) (construing definition of handicapped person under state statute in reliance on 29 U.S.C. § 706: "It is manifestly clear that the legislature did not intend to include within the meaning of 'handicapped persons' those people with 'any pulmonary problem' however minor, or all people who are harmed or irritated by tobacco smoke.").

59. The court may have left the question unresolved because, although the VA clearly had a duty to accommodate Vickers under § 501, Vickers had brought his action under § 504. See *infra* note 60 (overlapping obligations of federal employers under § 501 and § 504). Private actions under § 501, however, require plaintiffs to exhaust their administrative remedies. See *supra* note 46. Vickers had not sought administrative relief. Defendant's Reply Memorandum at 5, *Vickers*. The *Vickers* court could properly have denied or postponed relief to him on that basis, even though there is no exhaus-

to such accommodation under section 501 of the Rehabilitation Act of 1973.⁶⁰ Federal agencies have a duty under section 501 to ensure that handicapped individuals are afforded equal opportunities in job assignments and promotions. The remedy provision for an employee or applicant for employment under section 501 explicitly acknowledges that workplace accommodation is available as a remedy.⁶¹

The *Vickers* court, however, did not mention section 501. Its decision assumed that the VA owed a duty of accommodation to handicapped employees under section 504.⁶² Because the scope of the federal employer's

tion of remedies requirement for a suit filed for violation of § 504. *See Prewitt v. United States Postal Serv.*, 662 F.2d 292, 304 (5th Cir. 1981) (construing overlapping obligations of federal employers created by 1978 amendments to § 501 and § 504 to require federal employees to exhaust administrative remedies before filing a private cause of action).

60. Section 501 of the Rehabilitation Act of 1973, 29 U.S.C. § 791 (1976), has been uniformly interpreted to require federal employers to make reasonable accommodation to their handicapped employees. *E.g.*, *Ryan v. Federal Deposit Ins. Corp.*, 565 F.2d 762, 762–63 (D.C. Cir. 1977); *see also Southeastern Community College v. Davis*, 442 U.S. 397, 410 (1979) (describing § 501 as requiring “affirmative efforts to overcome the disabilities caused by handicaps”). Section 501 provides:

Each department, agency, and instrumentality . . . in the executive branch shall . . . submit to the Civil Service Commission and to the Committee an affirmative action program plan for the hiring, placement, and advancement of handicapped individuals in such department, agency, or instrumentality. Such plan shall include a description of the extent to which and methods whereby the special needs of handicapped employees are being met.

Rehabilitation Act of 1973 § 501(b), 29 U.S.C. § 791(b) (1976).

Originally, courts did not recognize a private cause of action against a federal employer for violations of § 501. *Prewitt v. United States Postal Serv.*, 662 F.2d 292, 302 & n.12 (5th Cir. 1981). In contrast, a private cause of action was judicially implied for violations of § 504. *See, e.g.*, *Lloyd v. Regional Transp. Auth.*, 548 F.2d 1277, 1287 (7th Cir. 1977). In its original version, however, § 504 did not apply to federal employers. Rehabilitation Act of 1973, Pub. L. No. 93-112, § 504, 87 Stat. 355, 394 (codified as amended at 29 U.S.C. § 794 (Supp. V. 1981)).

The 1978 amendments to the Rehabilitation Act extended § 504 to apply to “any program or activity conducted by an executive agency or by the United States Postal Service” and also created a private cause of action for violations of § 501 in a new section, § 505(a)(1). Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978, Pub. L. No. 95-602, §§ 119, 120, 92 Stat. 2955, 2982 (codified at 29 U.S.C. §§ 791, 794a(a)(1) (Supp. V 1981)). Thus, the 1978 amendments to the Rehabilitation Act created an overlap in statutory coverage for federal employers and employees. *See generally Prewitt*, 662 F.2d at 301–04 (analyzing history and interrelationship of §§ 501 and 504).

61. Section 505 of the Rehabilitation Act provides in part:

In fashioning an equitable or affirmative action remedy under [§ 501], a court may take into account the reasonableness of the cost of any necessary work place accommodation, and the availability of alternatives therefor or other appropriate relief in order to achieve an equitable and appropriate remedy.

Rehabilitation Act of 1973 § 505, 29 U.S.C. § 794a(a)(1) (Supp. V 1981).

62. The proposition that § 504 imposes an affirmative duty on federal employers to make reasonable accommodations to handicapped employees is open to question. The United States Supreme Court has held that a nursing school was not required under § 504 to make major adjustments in its program for a deaf applicant. *Southeastern Community College v. Davis*, 442 U.S. 397 (1979). *See infra* note 70. The Court stated that “neither the language, purpose, nor history of § 504 reveals an intent to impose an affirmative-action obligation on all recipients of federal funds.” *Davis*, 442 U.S.

duty to accommodate is the same under sections 501 and 504,⁶³ the special question raised by this case is whether it includes the obligation to force smoking employees to forgo that habit while in the workplace.

The *Vickers* court did not adequately address or resolve this issue. First, it found from the employer's internal policies a duty to accommodate the interests of those employees who smoke as well as the needs of the handicapped nonsmoker. A federal agency obviously cannot use internal policy to contradict its statutory duty to accommodate handicapped employees. Because there is no constitutional or statutory right to smoke

at 411. However, the Court recognized the thin line between refusal to provide affirmative action and illegal discrimination, and suggested in dictum that "situations may arise where a refusal to modify an existing program might become unreasonable and discriminatory." *Id.* at 412-13. The Court specifically suggested that it would be an act of illegal discrimination to refuse to implement technological advances which enhance the capacity of handicapped individuals to work effectively if such implementation could be accomplished "without imposing undue financial and administrative burdens." *Id.* at 412.

Subsequent courts and commentators have relied on this dictum in holding that § 504 requires accommodation for the handicapped when it does not impose undue burdens on the program or agency. *See Strathie v. Department of Transp.*, 716 F.2d 227, 230 (3d Cir. 1983); *cf. Prewitt v. United States Postal Serv.*, 662 F.2d 292, 307 (5th Cir. 1981). *See generally* Note, *Accommodating the Handicapped: The Meaning of Discrimination under Section 504 of the Rehabilitation Act*, 55 N.Y.U. L. REV. 881, 884-85 (1980) (*Davis* applies only to insurmountable impairment barriers; § 504 requires accommodation to surmountable impairment barriers).

Under this line of analysis, the VA is obligated under § 504 to make reasonable accommodations to *Vickers'* handicap because tobacco smoke in the workplace is not an insurmountable barrier. This analysis is arguably suspect, both because it conflicts with some of the express language in *Davis* ("neither the language, purpose, nor history of § 504 reveals an intent to impose an affirmative-action obligation on all recipients of federal funds," 442 U.S. at 411) and because it imposes on all federal grantees under § 504's "no discrimination" language the same affirmative duty to accommodate the handicapped which is far less ambiguously imposed on federal employers by § 501 and on federal contractors under § 503 of the Rehabilitation Act, 29 U.S.C. § 793 (1976 & Supp. V 1981).

63. *See Prewitt v. United States Postal Serv.*, 662 F.2d 292, 307 & n.21 (5th Cir. 1981). However, because § 504 applies to all recipients of federal funds, construing § 504 to impose an affirmative duty to accommodate the handicapped affects a broader group of employers and program administrators than does § 501.

The courts of appeals in four circuits, however, have held that § 504 does not apply to employment discrimination against handicapped individuals by recipients of federal funds unless providing employment is a primary objective of the federal assistance. *Scanlon v. Atascadero State Hosp.*, 677 F.2d 1271 (9th Cir. 1982); *United States v. Cabrini Medical Center*, 639 F.2d 908 (2d Cir. 1981); *Carmi v. Metropolitan St. Louis Sewer Dist.*, 620 F.2d 672 (8th Cir.), *cert. denied*, 449 U.S. 892 (1980); *Trageser v. Libbie Rehabilitation Center, Inc.*, 590 F.2d 87 (4th Cir. 1978). That analysis has been rejected by the Third Circuit, which recently held that § 504 prohibits any employment discrimination against the handicapped by recipients of federal funds. *Le Strange v. Consolidated Rail Corp.*, 687 F.2d 767 (3d Cir. 1982), *cert. granted*, 103 S. Ct. 1181 (1983). The Supreme Court will presumably resolve this conflict among the circuits.

in the workplace,⁶⁴ there is no source for the “certain rights”⁶⁵ which the *Vickers* court assigned to smoking employees. The *Vickers* court interpreted those rights to include the right to make a workplace inaccessible to a handicapped employee. Yet the *Vickers* court recognized that the legislature can ban smoking in public places and government offices. There is, however, no reasonable distinction between a legislative ban on smoking in the workplace, which the court expressly said it would enforce,⁶⁶ and legislation expressly requiring federal agencies to make reasonable accommodations to handicapped employees, if to accommodate the handicap requires a ban on smoking in the workplace.

Second, the court never addressed the issue of whether the VA’s refusal to ban smoking in its offices was reasonable. The court had found that exposure to even a minimal amount of tobacco smoke substantially limited Vickers’ capacity to work.⁶⁷ His federal employer had refused to accommodate his handicap by eliminating tobacco smoke in his workplace. The issue under the Rehabilitation Act is not, therefore, whether the employer had acted reasonably in its efforts to reduce Vickers’ exposure to tobacco smoke: the accommodation he sought was the elimination of tobacco smoke from his workplace. The question before the court was whether the VA’s refusal to implement a complete ban was reasonable under the Rehabilitation Act. If not, the VA’s refusal violated the Act.

As one court explicitly acknowledged, there is a “dearth of decisional law”⁶⁸ on the scope of the duty owed by federal employers to make reasonable accommodations to their handicapped employees. In evaluating the reasonableness of a refusal to accommodate, however, courts have relied on two factors identified by the United States Supreme Court in its first decision construing section 504, *Southeastern Community College v. Davis*:⁶⁹ (1) whether the proposed accommodation would change the es-

64. There are two old state cases supporting an individual’s right to smoke, at least in his or her own home or in open spaces. See *City of Zion v. Behrens*, 262 Ill. 510, 104 N.E. 836 (1914); *Hershberg v. City of Barboursville*, 142 Ky. 60, 133 S.W. 985 (1911). These cases were decided long before scientific evidence was available regarding the hazards of involuntary smoking and they rest on the overbreadth of the state laws construed therein. *Behrens*, 104 N.E. at 837; *Hershberg*, 133 S.W. at 986. Their persuasive value in this setting is nil.

It is not clear, however, whether federal employees so addicted to tobacco smoking that they are unable to work without smoking could succeed in a “reverse-*Vickers*” suit for violation of § 501 if denied the opportunity to smoke at work. Although the definition of the term “handicapped individual” in § 706(7)(B) expressly excludes a drug abuser whose current use of drugs constitutes a direct harm to the safety of others under §§ 503 and 504, there is no corresponding exclusion for § 501. 29 U.S.C. § 706(7)(B) (Supp. V 1981).

65. 549 F. Supp. at 89.

66. *Id.*

67. *Id.* at 87.

68. *Prewitt v. United States Postal Serv.*, 662 F.2d 292, 308 (5th Cir. 1981).

69. 442 U.S. 397 (1979).

sential nature of the program and (2) whether the accommodation would require extensive costs or other undue burdens on the employer or program administrator.⁷⁰

Tobacco smoking is clearly not an essential part of the work performed by the VA, particularly in its role as a provider of health care.⁷¹ The identifiable costs from instituting a no-smoking policy may include increased tobacco breaks for smoking employees⁷² and resignation of smoking employees unable to tolerate a no-smoking policy.⁷³ However, these costs are reasonable because no-smoking policies improve the health of all employees⁷⁴ and actually reduce an employer's overall employment costs.⁷⁵

No precedent construes section 504 or section 501 to require a ban on tobacco smoking in the workplace as an accommodation to a hypersensitive employee. Lack of precedent does not, however, indicate that such a requirement would be an "unreasonable" accommodation. The proposed accommodation in *Vickers* would have prohibited smoking in the workplace, eliminating a danger to the health of smokers and nonsmokers alike.⁷⁶ The very internal policy relied on by the court in denying *Vickers* the relief he sought states: "In light of the substantial evidence of the effects of smoking, it will be the policy of the Veterans Administration to undertake agencywide wide [sic] initiatives to reduce smoking in its facilities."⁷⁷ Because neither the nature nor the cost of the proposed accommodation would impose an undue burden on the VA, *Vickers* was entitled to have the court require the VA to ban tobacco smoke in his workplace.

70. *Strathie v. Department of Transp.*, 716 F.2d 227, 230 (3d Cir. 1983); see also *Prewitt*, 662 F.2d at 308-09 (relying on similar factors identified by EEOC regulation implementing § 504).

Davis had applied for admission to the Associate Degree Nursing program at Southeastern Community College. Due to a hearing disability, Davis was unable to communicate effectively without relying on lipreading skills. She was denied admission in part because of the College's belief that she would be unable to participate successfully in the clinical portion of the nursing program. 442 U.S. at 400-02. The *Davis* Court emphasized that she would require either close individual supervision by faculty members in clinical courses, *id.* at 407, 409, or dispensation from those courses, which would have "fundamental[ly] alter[ed] . . . the nature of the program," *id.* at 409-10.

71. The VA's national policy relied on by the *Vickers* court identifies as its objective the reduction of tobacco smoking in its facilities. Defendant's Memorandum in Support of Motion for Partial Summary Judgment, Exh. A, *Vickers*.

72. See *supra* note 39.

73. Cf. Affidavit of Robert Patterson at 2, *Vickers* (affidavit of one of *Vickers*' coworkers: "I do expect to have a designated place [at work] where I can smoke").

74. See *supra* notes 2-4. Moreover, to the extent that smokers are forced to cut back their smoking habits, their risk of death from lung cancer declines. 1982 HEALTH CONSEQUENCES, *supra* note 2, at 5.

75. See *supra* note 39.

76. See *supra* notes 2-4.

77. Defendant's Memorandum in Support of Motion for Partial Summary Judgment, Exh. A, *Vickers*.

IV. *PARODI* AND *VICKERS* COMPARED: WHO QUALIFIES FOR RELIEF UNDER THE STATUTES?

Under the disability retirement statute,⁷⁸ plaintiffs must show that they suffer from a disease or injury which prevents useful and efficient service. The level of minor throat and eye irritation suffered by most nonsmokers would probably not constitute a disease within the meaning of the Act. Under the Rehabilitation Act,⁷⁹ claimants must show that their adverse reactions to tobacco smoke substantially impair a major life activity. Obviously, few employees seeking bans on smoking in the workplace could qualify for relief under either of these statutes.⁸⁰

Even so, the *Parodi* and *Vickers* decisions can have a “derivative impact” which benefits all nonsmokers. Under the Rehabilitation Act, accommodations to a hypersensitive employee which reduce or eliminate tobacco smoke in the workplace benefit all employees who want smoking prohibited in the workplace. In *Vickers*’ case, some nonsmoking “concerned persons” have presumably benefited from the workplace accommodations already implemented because of the presence of a hypersensitive coworker. Thus, the “concerned persons” receive judicial relief in a derivative sense.

Under the disability retirement statute, the employee who qualifies as “disabled” can influence the workplace environment only at the employer’s discretion. However, the *Parodi* decision exerts economic pressure on the employer to alter the workplace in order to avoid paying disability benefits. If the employer responds to that pressure, nonsmoking coworkers of *Parodi* receive a similar derivative benefit.

Statutory relief for the hypersensitive employee is not unique. Prior to *Parodi* and *Vickers*, courts have awarded unemployment benefits to such individuals based on their justified refusal to work in environments where smoking was permitted.⁸¹ For the first time, however, these decisions recognize that federal statutes may require employers to reduce or eliminate tobacco smoke in the workplace.⁸² Both decisions have implications for application to other statutory schemes.

For example, most state fair employment practices statutes prohibit discrimination against prospective or current employees on the basis of

78. 5 U.S.C. § 8337(a) (1982).

79. 29 U.S.C. § 706(7)(B) (Supp. V 1981).

80. See *supra* note 14.

81. See *supra* note 17.

82. The *Vickers* decision assumed that the employer owed a duty to make reasonable workplace accommodation; the *Parodi* decision exerted economic pressure by its express analysis of employer options to modify the workplace instead of paying disability benefits.

handicap.⁸³ Although a majority of such statutes do not address the question of workplace accommodation,⁸⁴ some legislation expressly requires employers to make reasonable accommodations to their handicapped employees.⁸⁵ Similarly, although most state retirement schemes provide disability benefits only to the totally disabled, a significant number define disability as the inability to perform in the specific position last held by the employee.⁸⁶ While likelihood of success for a hypersensitive employee on the basis of such statutes will vary depending on the language and construction of the legislation involved, *Parodi* and *Vickers* are persuasive authority that such statutes could be used as the foundation for other hypersensitive employees seeking to ban tobacco smoke in the workplace.⁸⁷

V. *PARODI* AND *VICKERS* CONTRASTED: COMPENSATION VS. ACCOMMODATION AND MANDATORY VS. OPTIONAL REMEDIES

The *Parodi* and *Vickers* decisions address the issue of accommodation to the hypersensitive nonsmoker by a limitation or ban on tobacco smoke in the workplace. Their analyses differ markedly, however, because the

83. Forty-seven states prohibit employment discrimination against the handicapped, although five of these prohibit such discrimination only by the state itself as an employer. 8A LAB. REL. REP (BNA) 451:101-:104 (Nov. 1983).

84. *Id.* §§ 453, 455, 457.

85. See, e.g., WASH. ADMIN. CODE R. 162-22-080(1) (1980) ("It is an unfair practice for an employer to fail or refuse to make reasonable accommodations to the sensory, mental, or physical limitations of employees, unless the employer can demonstrate that such an accommodation would impose an undue hardship on the conduct of the employer's business."). Other states, however, have legislation which expressly provides that the duty not to discriminate does not include an affirmative duty to make workplace accommodations. See, e.g., KY. REV. STAT. § 207-150 (1981) ("No employer shall . . . discriminate against any handicapped individual with respect to . . . conditions of employment because of such person's physical handicap . . . This subsection shall not be construed to require any employer to modify his physical facilities or grounds in any way . . .").

86. Compare 2 NATIONAL ASSOC. OF STATE RETIREMENT ADMIN'RS, SURVEY OF STATE RETIREMENT SYSTEMS, State of Nebraska, County Employees Retirement System pt. II.A (1982) (requisite standard is total disability: "An employee may retire as a result of disability at any age if unable to engage in a gainful activity by reasons of physical or mental impairment which can be expected to result in death or to be of long-continued duration.") with 1 *id.*, State of Connecticut, State Employees' Retirement System pt. II.E (provides disability benefits for the first 24 months if state employee is disabled to perform job previously occupied; thereafter, standard of eligibility is total disability) and *id.*, State of Delaware, State Employees' Retirement System pt. II.A (state employee with five years credited service is entitled to disability benefits if she has a "physical or mental disability which prevents [her] from performing duties of position"). See generally NATIONAL ASSOC. OF STATE RETIREMENT ADMIN'RS, SURVEY OF STATE RETIREMENT SYSTEMS (1982) (compilation of individual surveys from almost all of the 50 states).

87. See *Schober v. Mountain Bell Tel.*, 96 N.M. 376, 630 P.2d 1231 (1980) (hypersensitive claimant awarded partial disability benefits under state workers' compensation statute).

statutes at issue in each case serve very different purposes. The disability retirement statute, the basis for the *Parodi* decision, serves only to compensate the disabled person for the loss of earning power she suffers as a result of her inability to provide useful and efficient service. Under the Rehabilitation Act, the basis for the *Vickers* decision, the employer is required to make reasonable modifications in the workplace or job requirements to accommodate the special needs of the handicapped employee.

This difference in statutory design is reflected in the courts' analyses. The key questions under the Rehabilitation Act are what constitutes reasonable accommodation and when a refusal to implement accommodation is reasonable. The *Vickers* court therefore examined in detail the steps taken and proposed by the VA to reduce Vickers' exposure to tobacco smoke. Under the disability retirement statute, workplace accommodation is at issue only because the hypersensitive employee is not disabled within the meaning of the statute if the employer removes the disabling environmental limitation. Consequently, the *Parodi* court did not examine in any detail potential changes the government could make in the workplace for removing the environmental limitation.⁸⁸

The statutes also place markedly different duties on the government employer. Under the Rehabilitation Act, federal employers are directed to make reasonable accommodations to handicapped employees. Prospective and existing employees injured by an employer's failure or refusal to make such accommodation can get judicial relief to force compliance. Because the disability retirement statute requires the government only to compensate its disabled employees, the government need not accommodate them, regardless of the feasibility of the proposed accommodations.⁸⁹

For the hypersensitive federal employee who wishes to force the employer to reduce or eliminate tobacco smoke in the workplace, a suit under the Rehabilitation Act is clearly preferable to a suit under the disability retirement statute. An individual who qualifies as "disabled" under the latter statute is also likely to be considered as handicapped under the former, and the persons eligible for disability benefits are also the employees entitled to the benefits of the statutory requirements of section 501. Hypersensitive employees should pursue relief under the disability

88. Indeed, the *Parodi* court used the terms "reduction" and "elimination" almost interchangeably in its suggestions to remove the environmental limitation. See *supra* note 40 and accompanying text.

89. The employer is of course under economic pressure to make accommodations to avoid paying disability benefits, see *supra* p. 319, but the employee has no judicially enforceable right to force it to do so, see *supra* p. 311.

retirement statute only if they prefer disability benefits to continued employment in an improved workplace.

VI. CONCLUSION

Under *Parodi*, a hypersensitive nonsmoker can force her employer to make a choice: pay her disability benefits or limit or ban tobacco smoke in the workplace. After *Vickers*, a federal employer may have to accommodate the needs of a hypersensitive individual by limiting or banning tobacco smoke in the workplace. These decisions offer only derivative relief to the nonsmoker who is merely concerned about the health hazards of involuntary smoking. Given the judiciary's general reluctance to grant relief based on a possibility rather than a probability of future harm,⁹⁰ concerned nonsmokers should seek relief in legislative action.⁹¹

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90. See *Ruckstuhl v. Commonwealth*, Unemployment Compensation Bd. of Review, 57 Pa. Commw. 302, 426 A.2d 719, 721 (1981):

Although it is now generally accepted that cigarette smoke may be harmful to smokers and non-smokers alike, we cannot presume for unemployment compensation purposes that anyone exposed to cigarette smoke in one's work environment is so physically harmed that a voluntary termination of employment will be automatically justified and unemployment benefits granted.

But see *Shimp v. New Jersey Bell Tel. Co.*, 145 N.J. Super. 516, 368 A.2d 408, 415 (Ch. Div. 1976) (quoting Dr. Daum, an industrial medicine specialist):

"Longterm health hazards causing or contributing to chronic disease are rarely recognized as work related and impede the collection of data necessary to promulgate a safe limit of low level exposure. In the absence of such data or longterm scientific studies dealing with a known noxious agent, it is a sound and accepted procedure in the practice of preventive medicine to eliminate the hazardous substance whenever possible until firm scientific guidelines can be established."

91. See generally STANFORD ENVTL. LAW SOC'Y, *supra* note 1, at 21-106 (examining federal, state, and local regulation of smoking).

The efficacy of legislation for hypersensitive employees will depend on the requirements it imposes on employers. Compare Wash. H.R. 229, 48th Leg. (1983) (limiting smoking in the office workplace: "Employers shall provide smoke-free areas for nonsmokers within existing facilities to the extent possible, but employers are not required to incur any expense to make structural or other physical modifications to provide these areas.") with Wash. H.R. 1464, 48th Leg. (1984) (prohibiting smoking in the office workplace "[i]f an accommodation that is satisfactory to all affected nonsmoking employees cannot be reached").